Supreme Court, U.S.
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No. 90-1507

In The

Supreme Court of the United States

October Term, 1990

THE EMPIRE CLUB, a general partnership,

Petitioner,

vs.

BIJOU IRRIGATION DISTRICT, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BIJOU IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED AS STATED BY PETITIONER

Whether a landowner's reasonable recreational use of the surface of an irrigation reservoir abutting and overlying his land is excluded as a matter of law by the right of way granted by the United States for the reservoir under the Right of Way Permit Act of March 3, 1891 (ch. 561, § 18, 16 Stat. 1101 (1891), 43 U.S.C. § 946 (1988)).

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BIJOU IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

Respondent, the Bijou Irrigation District, ("District") respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Empire Club, petitioner here, fundamentally mischaracterizes the scope of the dispute presented this Court. Contrary to the Club's claims, the Colorado Supreme Court did no more than resolve a purely private

dispute. The Colorado Supreme Court was very careful in limiting the scope of its opinion, clearly stating that its opinion did not implicate any public or federal interests:

> The Landowners are asserting private rights, not public rights, and we have no occasion to determine the nature and extent of any public rights that may exist or be created for use of Empire Reservoir. Moreover, neither the State of Colorado nor the Bureau of Land Management is a party to the declaratory judgment action, and any rights to use of the reservoir that might be asserted by these landowners are not at issue in this case.

Pet. App. 22 n.18.

The greater portion of petitioner's statement of the case relies upon and adopts as authority various findings, conclusions, and holdings of the unreported trial court's judgment, Pet. App. 31, which were neither adopted by nor included in the Colorado Supreme Court's opinion. The District respectfully presents the following statement of the case as determined by the Colorado Supreme Court which bears more directly upon the Club's petition.

The Empire Club is a general partnership formed in August of 1982 and is comprised of a number of private individual members. The members of this private club purchased parcels of land abutting and underlying the subject private irrigation reservoir known as Empire Reservoir. A copy of the purchase contract, admitted into evidence as Exhibit FF in the courts below, is attached hereto as Resp. App. A. This private club was formed for the primary, if not the exclusive, purpose of acquiring and operating its lands for its private recreational use.

Of critical importance to this case, the contract of sale contains the express provision that any right to use the surface of the reservoir must be acquired from the District by a separate agreement:

> 6. *Warranties*. . . . The purchasers [the Empire Club] understand and acknowledge that any right to use the surface of the Empire Reservoir must be acquired by separate agreement from the Bijou Irrigation District, which is the owner and operator of said Empire Reservoir.

Resp. App. 3.

The Colorado Supreme Court also found that the Club (as well as other landowners[1]) derived its title through patents which were issued subsequent to the District's reservoir grant and, therefore, acquired its property with notice of the District's interest and took title subject to that interest. Pet. App. 8.

The respondent is an irrigation district formed under the laws of the State of Colorado on April 12, 1905, for the purpose of furnishing water for irrigation of taxpayers' lands located within the District. The District is the owner of various water rights adjudicated pursuant to the laws of the State of Colorado. The District and its taxpayers, at their sole cost and expense and under the District's adjudicated priorities, divert waters from the South Platte River through approximately 20 miles of

---

[1] The "landowners" comprise all of the owners of *private lands* abutting or underlying the reservoir who were named as defendants in the original action and as respondents herein. It should be noted that none of the other respondent private landowners have joined in this petition.

canal for ultimate storage in the Empire Reservoir, which has a maximum storage capacity of 37,709 acre feet. The waters diverted by the District and stored in the reservoir are then ultimately delivered to the District's taxpayers, approximately 200 farmers in semi-arid northeastern Colorado, for irrigation of approximately 19,000 acres of land. Pet. App. 7.

The subject Empire Reservoir was constructed by the District in the early 1900s upon the reservoir site obtained through a grant from the United States of America issued to the District on May 9, 1907, pursuant to the Act of March 3, 1891, ch. 561, § 18, 26 Stat. 1101. That Act authorizes the grant of right-of-ways for such water storage facilities for irrigation, and it is now codified at 43 U.S.C. §§ 946-949.

The storage reservoir is not a natural lake, nor is any part of it a natural lake. Its construction consists of earthen dams which "are classified as high hazard dams" by the Office of the Colorado State Engineer. Pet. App. 7. The State Engineer's Office for the State of Colorado holds the District responsible for maintaining the structural integrity of the earth-filled dams. This integrity is jeopardized, as found by the Colorado Supreme Court, by motor vehicle travel and displacement of concrete and rip-rap used to maintain the embankment. Pet. App. 9 n.4. Accordingly, as recognized by the Colorado Supreme Court, the District is liable for injuries to life and property caused by waters escaping from the reservoir under state law, particularly, Colo. Rev. Stat. § 37-87-104(1). Pet. App. 21.

The Colorado Supreme Court found that there are practical considerations incident to the administration of the reservoir requiring rapid fluctuations in the water levels which, in turn, create hazards for any users of the reservoir. Pet. App. 20. All of these considerations make it essential that the reservoir operator have control of the use of the reservoir, not only to protect the reservoir users, but to protect the operator from liability to the users and persons and property situated below its dams. Pet. App. 20 and 21. The record in this case discloses, by uncontroverted evidence, that the annual cost of maintenance and operation of the subject reservoir is approximately $175,000, and the annual cost of liability insurance, when and if available, has been in excess of $27,000 per year.

As previously noted, the grant of the Empire Reservoir right-of-way to the District was prior to the issuance of any patents to the Club or its predecessors in interest. As recognized by the Colorado Supreme Court, the "main and controlling purpose" of the reservoir grant to the District is irrigation and all other uses are subsidiary. Pet. App. 18. The Colorado Supreme Court specifically found that: "It is the expanded *commercial use* by *private landowners* that led the district to seek a declaratory judgment recognizing its right to prohibit or control all uses of the reservoir by the landowners." Pet. App. 9 (emphasis added).

The basic question and issue decided by the Colorado Supreme Court in its decision is as follows:

> We believe that a reservoir company's long-recognized right to control stored water, based as it is on practical considerations and administration and

> safe storage of this water, militates against recognition of a right in the landowners to make *private recreational use* of water stored in Empire Reservoir.

Pet. App. 21-22 (emphasis added).

While it is readily apparent that the sole interest and claim of the Empire Club in this case is its "private recreational use" of the reservoir for recreational purposes, the Club attempts to interject in its Statement of the Case selected portions of its own Petition for Rehearing, closing briefs filed in the trial court, and excerpts from its joint Answer Brief filed in the Appellate Court. This material alludes to occasional recreational use by the public of the reservoir. The Club also attempts to interject some vague theory of historical or adverse-use claim. The Colorado Supreme Court, however, clearly and repeatedly limited its opinion to claimed private use and specifically excluded any claim for public use. Pet. App. 22 n.18. In addition, any historical or adverse use claim is contrary to Colorado law which exempts the District and other government and quasi-governmental entities from such claims. Colo. Rev. Stat. § 38-41-101.

REASONS FOR DENYING THE WRIT

I. THE MATTERS DETERMINED IN THIS LITIGATION AND DECIDED BY THE COLORADO SUPREME COURT ARE LIMITED TO THE CLAIM OF RIGHT BY A PRIVATE MEMBERSHIP CLUB TO THE RECREATIONAL USE OF THE WATERS DIVERTED AND STORED BY THE DISTRICT IN EMPIRE RESERVOIR.

The Empire Club's rights, if any, arise solely through their acquisition of lands abutting or underlying the

District's reservoir. The Club's interest, the Colorado Supreme Court found, is subservient to the District's prior reservoir grant. Pet. App. 8. More importantly, as shown in Resp. App. A, the Club agreed that "any right to use the surface of the Empire Reservoir must be acquired by separate agreement from the Bijou Irrigation District."

The Colorado Supreme Court was clear, careful and precise in its opinion that this particular decision is limited in its application to these private landowners, including this private membership club, in their claimed private recreational use of waters stored in the Empire Reservoir. Pet. App. 22 n.18. The Colorado Supreme Court's ultimate holding is expressly limited to the Club's and other landowner's private recreational use. Pet. App. 29.

The Club, in its petition and before the Colorado Supreme Court, attempts to somehow attach itself to some general public claim or interest in the recreational use of the reservoir. Again, the Colorado Supreme Court in its decision was very clear and precise in limiting the application of its decision in this matter to the private parties in the litigation, and *specifically excluded* the application of its decision in respect to any claim of public right or use of the subject waters for recreational purposes:

> These cases do not present issues concerning any rights that may exist or be created in the public to make use of Empire Reservoir.

Pet. App. 7. The court also stated:

> The landowners are asserting private rights, not public rights. We have had no occasion to determine the nature and extent of any public rights that may exist or be created for the use of Empire Reservoir.

Pet. App. 22 n.18.

II. THE COLORADO SUPREME COURT'S OPINION IS IN COMPLETE HARMONY WITH ALL OF THE CASES CITED BY PETITIONER.

The Empire Club asserts that the Colorado Supreme Court's opinion in this case conflicts with three federal circuit court opinions, an Idaho Supreme Court opinion, an opinion by the Secretary of the Interior, and an Interior Board of Law Appeals decision. A review of each of these cases quickly reveals that they are in complete harmony with the Colorado Supreme Court's opinion here.

United States v. Big Horn Land & Cattle Co.

The Empire Club's reliance upon *United States v. Big Horn Land & Cattle Co.*, 17 F. 2d 357 (8th Cir. 1927), is misplaced because that case supports, not contradicts, the Colorado Supreme Court's opinion here. In *Big Horn*, the right-of-way holder attempted to assert exclusive control not only over the holder's dam and irrigation facilities, but over two large adjacent natural lakes as well. *Id.* at 360. The circuit court held, as a conclusion of fact, that the right-of-way only extended from a small dam at the outlet of the large, lower, natural lake to the end of a man-made ditch some distance downstream. Thus, the

right-of-way holder had no right to exclude anyone from the large natural lakes because they were not covered by the right-of-way.

The circuit court in *Big Horn* distinguished the facts in that case from a situation involving "an artificial [reservoir] constructed by the [right-of-way holder]," *id.* at 364, which is the situation in this case. More importantly, the circuit court indicated that as to those lands covered by the right-of-way, the right-of-way holder had the right "to maintain the present outlet structure up to its present height, *and to protect the same against the usual hazards.*" *Id.* at 364 (emphasis added). Thus, the circuit court recognized that a right-of-way holder has the right to protect the integrity of a reservoir constructed by that holder – the very same right recognized by the Colorado Supreme Court in this case.

Grindstone Butte Project.

In *Grindstone Butte Project*, 18 I.B.L.A. 16, Gowers Fed. Serv. (Misc.) 98 (1974), the Interior Board of Land Appeals ("IBLA") considered a challenge by a right-of-way grantee to the imposition of certain conditions imposed by the Secretary of the Interior on the right-of-way grant for protection of the environment. 18 I.B.L.A. at 18. *Inter alia*, the grantee argued that imposition of the conditions "are unreasonable as they prevent [the grantee] from having exclusive use and control of the right-of-way areas." *Id.* at 20. The IBLA disagreed, stating that the grantee had no such rights and that it had not demonstrated that the conditions "are either inconsistent with or tend to unreasonably encumber the proposed project," *id.* at 21, relying, in part, on *Big Horn Land &*

Cattle, discussed above. In eventually affirming the IBLA, the Ninth Circuit indicated that the Secretary of the Interior has the power to impose environmental conditions on right-of-way grants. *Grindstone Butte Project v. Kleppe*, 638 F. 2d 100 (9th Cir 1981). The Ninth Circuit did not address the "exclusive right" argument raised by the grantee before the IBLA. *Grindstone Butte*, therefore, involved an issue totally unrelated to the case *sub judice*, and, in any event, nothing in either opinion is in any way inconsistent with the Colorado Supreme Court's opinion here.

City and County of Denver v. Bergland.

The Empire Club claims that the Colorado Supreme Court's opinion here somehow conflicts with *City and County of Denver v. Bergland*, 517 F. Supp. 155, 190 (D. Colo. 1981), *aff'd in part, rev'd in part*, 695 F. 2d 465 (10th Cir. 1982). The Club's claim appears to be based upon an assertion that the Colorado Supreme Court made the scope of rights attendant to a right-of-way a matter of state law. The Club's confusing claim is incorrect. Nothing in *Bergland*, involving a dispute between Denver and the federal government over the scope of Denver's right-of-way, is inconsistent with the Colorado Supreme Court's opinion.

The dispute involved a situation where Denver had allegedly constructed certain facilities outside the physical boundaries of its right-of-way on federal land. That part of the district court's opinion cited by the Empire Club deals with the court's discussion of the physical boundaries of the right-of-way. In the footnote cited by the Club, the district court rejected Denver's claim that

the scope of the right-of-way should be decided as a matter of state common law. The court held that the scope of the grant was a matter of federal law. This holding is consistent with the Colorado Supreme Court's opinion in analyzing the scope of the District's right-of-way. Pet. App. 21 n.17. *See also* Pet. App. 11-16 (construing federal law in determining scope of District's right-of-way).

Even more confusing is the Club's quotation of the Tenth Circuit's opinion in *Bergland*. That part of the Tenth Circuit's opinion quoted by the Empire Club has nothing to do with this case.

Coulsen v. Aberdeen-Springfield Canal Co.

The Empire Club's reliance upon *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 277 P. 542 (1929), is particularly curious. *Coulsen* involved a negligence claim by the owner of a prize bull. The bull tripped and fell into an irrigation ditch, to its peril. The ditch owner, the holder of an irrigation right-of-way, argued that it had exclusive control over the ditch and that the bull was a trespasser. The Idaho court disagreed, and, in the process, discussed one of the fundamental rationales underlying the Colorado Supreme Court's opinion in this case: that a right-of-way holder is responsible for the operation and maintenance of its right-of-way. 277 P. at 546. Significantly, the Idaho court, like the Colorado Supreme Court, recognized that a right-of-way grantee has the right of possession and control "reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way." *Id.* at 544. *Coulsen* is completely consistent with the Colorado Supreme Court's opinion here.

Two Opinions From the Department of the Interior.

The first opinion cited by the Empire Club, *Zelph S. Calder*, 81 Interior Dec. 339 (1974), dealt with a request by a right-of-way applicant to raise fish in its reservoir for private purposes. The IBLA said no, relying upon *Big Horn*, discussed above. *Calder* has nothing to do with inconsistent uses by two private parties which is the case here, but rather the right of a right-of-way holder to use its right-of-way for purely private purposes not related to irrigation.

The second opinion, *Dixon v. Dry Gulch Irrigation Co.*, 45 Interior Dec. 4 (1916), involved a request by a subsequent right-of-way applicant to use a proposed reservoir subject to a then-existing right-of-way. The First Assistant Secretary of the Interior opined that a subsequent right-of-way applicant should be granted the right also to use the reservoir, as a matter of Interior policy, if the applicant could show that the proposed use is consistent with the existing use. *Id.* at 6. That conclusion is completely consistent with the Colorado Supreme Court's opinion which merely held that the Club's servient, purely private recreational use was inconsistent with the District's irrigation use.

III. THE COLORADO SUPREME COURT'S DECISION IS IN HARMONY WITH THE DECISIONS OF THIS COURT AND OTHER COURTS THAT THE INTEREST OF THE DISTRICT IS AN EASEMENT RATHER THAN A LIMITED FEE.

One of the main arguments advanced by the Empire Club before the Colorado Court in this action was that

the interest of the District was in the nature of an easement rather than a limited fee as claimed by the District. It was this very issue that the Colorado Supreme Court found in favor of the Empire Club and against the District: "We affirm the judgment of the Morgan County District Court in the declaratory judgment action to the extent that it holds that the District holds an easement rather than a limited fee for the operation and maintenance of Empire Reservoir." Pet. App. at 19.

If there exists any confusion in regard to this matter, it existed only in the mind of the lower trial court as noted and cited in the Empire Club's brief. Pet. App. at 50. As stated in the Club's Brief, *Great Northern Railroad Co. v. United States*, 315 U.S. 262 (1942) criticized some of the earlier decisions holding that a right-of-way grant was more in the nature of a "limited fee." As shown in the Colorado Supreme Court's opinion at Pet. App. 11-16, the Colorado Supreme Court follows the *Great Northern* case and all other applicable federal cases in its holding that the nature of the District's interest is an easement rather than a limited fee.

The Empire Club's brief also complains that the Colorado Supreme Court applied "Colorado water law" and not federal law in this case. Even a cursory review of the Colorado Supreme Court's opinion reveals that the part of the opinion cited by the Club for this proposition was only concerned with the District's liability under state law. The Club's claim that this part of the opinion somehow turned this case into a dispute over state water law is simply incorrect.

CONCLUSION

This case involves only a private controversy between a private club and a private reservoir district as to the recreational use of the District's reservoir. As demonstrated in this response, the Club acquired its interest in its lands subject to the specific proviso that "any right to use the surface of Empire Reservoir must be acquired by a separate agreement from the Bijou Irrigation District." This provision in the Club's purchase contract clearly envisioned that the Club's prospective use of the surface of the waters in Empire Reservoir was to be the subject matter of a *separate* and *private* contract between the Club and the District. The Colorado Supreme Court, moreover, specifically recognized that this case deals only with the Club's asserted private rights, not any public rights. Pet. App. 22 n.18.

Nothing in this case warrants review in this Court and the petition should be denied.

Respectfully submitted,

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Resp. App. 1

CONTRACT OF SALE

THIS AGREEMENT made and entered into this *30th* day of August, 1982, by and between MURRAY H. GILLILAND, hereinafter referred to as Seller, and THE EMPIRE CLUB, by and through its members individually hereinafter referred to as Purchasers,

WITNESSETH:

That the Seller agrees to sell and the Purchasers agree to buy the real property which is reflected on Exhibit A which is attached hereto and made a part hereof by incorporation upon the following terms:

1. *Consideration.* The purchase price shall be the sum of $275,000.00 payable as follows:

A. $6,000.00 upon the execution of the agreement, the receipt of which is hereby acknowledged.

B. $56,500.00 in cash or certified funds to be due and payable at the time of closing and delivery of possession as hereinafter provided, provided, however, that the Seller shall give credit against this payment for any commissions due and payable at the time of closing as hereinafter stated.

C. The balance of the purchase price in the approximate amount of $212,500.00 shall be represented by a promissory note executed by the Purchasers and secured by a first deed of trust upon the above premises. Said note shall accrue interest at the rate of ten percent per annum and shall be payable in ten equal yearly principal installments of $21,250.00, plus accrued interest. Said installments shall commence one year after

> the date of closing and delivery of possession as hereinafter provided and shall continue on the same date of each and every year until paid in full. In the event any installment is not paid when due, then in that event any and all principal balances shall accrue interest at the rate of eighteen percent per annum.

2. *Closing & Delivery of Possession.* Upon the payment of the sums as hereinabove provided, the Seller shall deliver to the Purchasers his good and sufficient Warranty Deed conveying title to the above premises, free and clear of all liens and encumbrances, and subject only to easements and rights of way of record; mineral reservations of record, if any; 1982 taxes due and payable in 1983 and thereafter; special assessment and taxing districts of record; which closing and delivery of possession shall take place within sixty days from the date of the execution of this agreement or at such other times as the parties may mutually agree. Said closing to take place in the offices of Edward L. Zorn at 317 Ensign Street, Fort Morgan, Colorado.

3. *Taxes.* The 1981 taxes due and payable in 1982 shall be paid by the Seller and the 1982 taxes due and payable in 1983 shall be prorated between the parties as of the date of closing and delivery of possession.

4. *Abstract of Title.* The Seller shall furnish unto the Purchasers within a reasonable time after the execution of this agreement, abstracts of title to said premises showing good and merchantable title in the Seller, subject only to the items as reflected in paragraph 2 above.

5. *Assignability*. This contract may not be assigned in whole or in part by the Purchasers without first receiving the express written consent of the Seller.

6. *Warranties*. It is acknowledged by the purchasers that they have been in possession of the above premises under a rental agreement and are familiar with the premises and do hereby acknowledge that the Seller has made no warranties, either express or implied, with regard to the above premises or the uses to which said premises may be put and thus, the Purchasers are accepting said premises in an "as is" condition without any warranties or guarantees from the Seller, either express or implied. The Purchasers understand and acknowledge that any rights to use the surface waters of the Empire Reservoir must be acquired by separate agreement from the Bijou Irrigation District, which is the owner and operator of said Empire Reservoir.

7. *Forfeiture*. Time shall be of the essence of this agreement, and this contract shall in no wise be considered an equitable mortgage. In the event the Purchasers shall default said contract in any respect or under any of the covenants herein, the Seller shall have the option of declaring said contract forfeited and/or may sue in specific performance for the unpaid balance of the purchase price, together with any and all damages or remedies as may be provided by law. In the event the Seller determines to declare said contract forfeited, the Seller shall be entitled to immediate possession and enjoyment of the premises. Nor forfeiture shall be declared until after thirty days written notice to Ronald H. Connors, agent for the Purchaser, shall be given by regular prepaid mail

to the following address: Ronald H. Connors, 8032 Greenwood Boulevard, Denver, Colorado 80221.

In the event the Seller shall default said contract in any respect or under any of the covenants, the Purchasers shall have the option of declaring said contract rescinded or may sue in specific performance for the completion of the same, together with any and all damages and remedies as provided by law.

In the event it is necessary for a non-defaulting party to employ counsel to enforce this contract or collect any damages as may be allowed by law, then in that event the defaulting party shall be responsible for the reasonable attorneys' fees and court costs of the non-defaulting party.

THIS AGREEMENT shall be binding upon the heirs, legal representatives and assigns of the respective parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year first written above.

Murray H. Gilliland

Seller

Empire Club, by its members individually

(Sig) _____

Robert H. Connors

(Sig) _____

Curtis J. MacIntyre

(Sig) _____

Bob Hill

(Sig) _____
Dave Headstream

(Sig) _____
Alan Olsen

(Sig) _____
Donald K. Fuqua

(Sig) _____
Tom Proehl

(Sig) _____
Edward A. Perme

(Sig) _____
Jim Brannon

(Sig) _____
William N. Pilcher

(Sig) _____
Marv Isaacson

Seller accepts the above proposal this ___ day of July, 1982 and agrees to pay a commission of nine percent of the purchase price for services in this transaction, provided this transaction is closed and completed pursuant to the terms and provisions of the above agreement. It is further agreed that the purchasers or their agent shall receive credit for the above commission against the payment due as the time of closing as hereinabove provided.

_____
Murray H. Gilliland
Seller

EXHIBIT A

[showing map]

Parcel #1

SE 1/4 Sec. 1-
T-3-N R-61-W
Weld Co.

85 acres, more or less

Parcel #2

NE 1/4 Sec - 12
T-3 -N R-61-W
Weld Co.
130 acres, more or less

Parcel #3

Lots 6&7
&8 S.W. 1/4 Sec. 6 T-3-N
R-60-W
Morgan Co.
153 acres, more or less